Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the	)	
Cable Television Consumer Protection and	)	MM Docket No. 93-25
Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN THE NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION AND SUMMARY

The Alliance for Community Media and the National Association of Telecommunications Officers and Advisors ("Alliance/NATOA") respectfully submits these reply comments to comments made in conjunction with the Notice of Proposed Rulemaking, FCC 95-484, in the above-captioned proceeding, released January 21, 1997 ("Notice"). Alliance/NATOA acknowledges the strong interest of the Commission in creating a Direct Broadcast Satellite ("DBS") industry that competes effectively and fairly with the cable industry. Congress also recognized this need. That is why it imposed public interest obligations on the DBS industry under Section 25 of the 1992 Act[1] that, if implemented properly

[1] Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, (1992), 106 Stat. 1460 ("1992 Act"), Sec. 25 (codified at 47 U.S.C. Sec. 335).

by the Commission, will be roughly equivalent to the regulatory burdens placed on cable operators.

In general, the Alliance strongly supports comments made by other members of the public interest community in this proceeding -- DAETC et al., the Center for Media Education et al., Research TV, and AAPTS/PBS. All of these commenters are non-profit entities with an interest in promoting viewpoint and content diversity in the mass media, and promoting the use of media for non-profit educational, informational, and civic purposes. We share the concerns of these commenters that the public-interest capacity reservation not suffer the same fate as cable leased-access, where carriage is a de jure but not a de facto right.

Implementation of Section 25 in accord with the plain language of the statute will provide our nation's children with a rich source of educational and informational programming, while preserving a fair competitive balance between two multichannel video distribution technologies that have radically different histories and physical limitations. The Commission should establish a system for administration and maintenance of the "non-commercial set-aside" that, insofar as possible, replicates the methodology of public, educational and governmental ("PEG") channels on cable television systems. The more similar the systems are made, the more likely that the result will be competitive neutrality.

II. SECTION 25 REQUIRES A FOUR TO SEVEN PERCENT RESERVATION OF CAPACITY.

The DBS industry[2] touts its viability and success[3], but for purposes of implementing Section 25 claims to need the coddling of an infant.[4] The DBS industry is asking the Commission to ignore the letter of the law in order to be protected, not only from its competitors, but from Congress' desire to ensure that DBS public-interest capacity be utilized to provide meaningful non-commercial educational and information services. Moreover, the cable industry has taken this opportunity to request that all public interest requirements for both cable and DBS be eliminated in the name of "regulatory parity."[5] The Alliance/NATOA hope that the Commission will not respond to the providers' invitations to subvert the public interest requirements of two industries.

The DBS industry inexplicably attempts to reinterpret the least ambiguous provision of Section 25, the four to seven percent capacity reservation, as a three-to-four percent capacity reservation. Simply speaking, The DBS industry has asked the Commission to agree to a channel reservation scheme which is mathematically incorrect. By dropping one increment out of their sliding scale, they have effectively rewritten the statute so that, in their view, the

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[2] For the purposes of this reply comment, the "DBS industry" indicates selected filers in this proceeding, including the comments of Satellite Broadcasting Communications Association of America ("SBCA"), United States Satellite Broadcasting Company, Inc. ("USSB"), DirectTV, Inc. ("DirectTV"), American Sky Broadcasting LLC ("Sky"), Primestar Partners LP ("Primestar") and TEMPO Satellite, Inc. ("TEMPO").

[3] See, e.g., Comments of US West at 2 ("DBS providers...have experienced substantial subscriber growth...")

[4] See e.g., SBCA at 2 ('DBS... is still nascent in its development").

[5] National Cable Television Association Comments at 4; Time-Warner Cable Comments at 10-11.

required reservation is between three and four percent rather than from four to seven percent.[6] The Commission is prohibited by law from adopting the DBS providers' proposal.

The Alliance/NATOA joins with DAETC et al. in calling for a sliding scale incremental scheme which uses four percent as the minimum baseline, with proportional increases to seven percent as the number of available channels on each system grows.[7] We believe this more accurately reflects Congress' intent to impose lighter burdens on smaller entities, and more comprehensive responsibilities on larger entities. The public interest reservation scale also, unlike the DBS providers', complies with the law.

The DBS industry also has expressed its "concern" that people might not watch discrete public interest channels;[8] consequently, they have generously offered to "meet the obligation on a time/hour equivalency basis"[9] and spread the programming into a number of different channels and time slots, at their sole discretion.[10] This is unacceptable. It not only violates the prohibition on editorial control, but also represents an enormous -- perhaps insuperable -- barrier to potential audiences that will be unable to view programming shown at "off" hours. Unless the Commission explicitly commits to requiring that such programming be shown during times when they are likely to have a substantial audience -- for instance 12 Noon to Eleven p.m. eastern time -- public interest programming will be relegated to the unwatched and inaccessible slots of dark channels. Consequently we join with all of our public interest allies

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[6] See reproduction of SBCA allocation chart (SBCA Comments at 11), attached as Exhibit A.
[7] DAETC at 14.
[8] DirectTV at 7.
[9] Id.; SBCA at 12.
[10] Id.

in insisting that the non-commercial and educational programming capacity be given in terms of discrete channels, not in terms of (otherwise) dead time.

III. THE INDUSTRY SHOULD BEGIN PLANNING TO COMPLY WITH THE LAW.

Alliance/NATOA agrees with those commenters who noted that the industry has been on notice regarding the pendency of this requirement since 1992 -- no less than five years.[11] During that time, the industry has fought this requirement at the Commission and in the federal courts. The law is clear and unambiguous and its constitutionality has been upheld by the D.C. Circuit.[12]

We believe that the industry should start planning now to meet the requirements of the law. Transponder space and uplink facilities already operating and would-be programmers (including Alliance members) have substantial backlogs of quality non-commercial programming. All that remains is for the operators to activate the channel capacity and for the Commission to devise a system for its use. There are no physical or financial barriers -- only procedural barriers remain. Under no circumstances should the industry be permitted to delay any more than 45 days past the issuance of the order in this rulemaking.

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[11] DAETC at 25; AAPTS/PBS at 43-44.

[12] Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996), reh. den. No. 93-5349 (D.C. Cir., Feb. 7, 1997).

IV. "NO EDITORIAL CONTROL" MEANS "NO EDITORIAL CONTROL".

The DBS industry seems to have disregarded the provision Section 25(b) that prohibits them from exercising editorial control over non-commercial reserved capacity. Inexplicably, they suggest a system which would give DBS providers three points at which they could exercise substantial control. First, they propose a clearinghouse whose governance would be composed of 50% DBS industry representatives.[13] Second, after having used a clearinghouse it controls to make an initial choice, they believe they should have the ability to select "their" public service programming from the pool certified by this non-profit clearinghouse,[14] inexplicably finding a right to "decid[e], on the basis of its own market research and business planning, the combination of offerings that would best satisfy its viewers."[15]

Finally, the industry suggests that programming of a provider's own choosing should count toward the set-aside, including C-SPAN, C-SPAN-2, The Discovery Channel, the Learning Channel and Animal Planet.[16] According to the industry, if four percent of programming selected by DBS providers were to be self-classified as "public-spirited," both their reservation obligation under Section 25(b) and their public interest obligations under 25(a) would be deemed met.[17] Not only are these of the providers' choosing, but all but C-SPAN are commercial as well. That does not bother the industry however -- the industry does not consider commercials to be commercial. They suggest that "programming which carries

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[13] SBCA at 5.
[14] Id. See also SBCA at 7 ("Each provider should make its own judgment on the programming mix which will best serve its subscriber base"); See also DirectTV at 9.
[15] SBCA at 7.
[16] Primestar at 21-24.
[17] Id.

commercial advertising related to its purposes and [which] furthers the public service goals it espouses"[18] (emphasis added) is somehow non-commercial. The DBS industry doesn't explain why commercial advertising is non-commercial -- they simply assert that this is the case. The Commission is legally prohibited from approving such a scheme. There is no prohibition against the use of the capacity for public service announcements. But public service announcements are not "commercial advertising."

Alliance/NATOA endorses the idea of a non-profit clearinghouse financially supported by the DBS industry -- but not controlled by it. As Alliance/NATOA stated in its initial comments, we support a clearinghouse mechanism for distributing programming, but only insofar as representation from commercial entities of any form (whether or not connected with the DBS industry) is ten percent or less. The majority of such a clearinghouse governing body should be comprised of "blue ribbon" representatives of the educational, arts, and public service communities. A DBS industry representative would undoubtedly be a helpful and welcome addition to the decision-making process, insofar as those representatives can help the commission gain a better understanding of the technical and practical constraints under which the system must operate. But to create a situation in which the industry exercises control over the content of the programming, either indirectly or directly, is clearly prohibited by the law.

[18] SBCA at 8.

V. NON-COMMERCIAL PROGRAMMERS ARE GIVING PROGRAMMING TO DBS PROVIDERS; COMPENSATION TO THOSE PROVIDERS IS NOT APPROPRIATE.

As public interest commenters have noted, the legislative history of the 1992 Act gives extensive instructions on what constitutes "direct costs."[19] Direct cost includes only those marginal, incremental costs which result from the additional costs incurred by the provision of the service to that particular customer. Thus by definition, direct costs cannot include the costs that the industry suggest should be included, including research and development, satellite construction and launch, capital costs, personnel, and maintenance.[20]

We join our colleagues in suggesting that public interest programming on this reserved capacity be carried at no charge. As AAPTS/PBS noted, in some cases DBS providers have had to pay non-commercial entities to carry non-commercial educational programming.[21] The Commission should recognize that the public interest and educational communities are giving free public affairs and educational programming to the industry . This resource is of significant monetary value, and will undoubtedly attract additional viewers to DBS. Thus, Alliance/NATOA feel that free carriage of this programming (programming that DBS providers have in the past paid for) is not an unreasonable request, and may be preferable to requiring the DBS industry to provide financial information which would allow the Commission to verify their direct costs.

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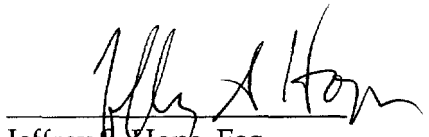
[19] H.R. Rep. 102-628, 102nd Cong. 2d Sess. at 125 (1992); See also DAETC at 22-24, AAPTS/PBS at 22-24.
[20] SBCA at 15; Primestar at 24-26; Sky at 22; DirectTV at 16-18.
[21] AAPTS/PBS at 20.

VI. CONCLUSION

For these reasons, Alliance/NATOA urge the Commission to implement Section 25 as quickly as possible, and allow DBS subscribers to benefit from educational and informational programming that already exists, and is simply waiting for a medium where it can be carried and seen.

Respectfully Submitted,



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with the use of compression in this marketplace. This enables a more realistic computation of the anticipated numbers of channels out of the total number of channels that are available that should be used to meet the public service obligations.

With that in mind, SBCA recommends the following "step" system for applying the 4% requirement against the total eligible channel basis. Based on the annual calculation which we have previously proposed herein, the channel capacity requirement for public service is to be determined for the particular year and remain fixed until the next annual calculation. No partial channels are to be counted.

Scale of Capacity of Commitment

(4% of 175 Channels = 7)

# of Channels	#Public Service
175+	7
150-174	6
125-149	5
100-124	4
50-99	3
25-49	2*
<25	1

*at 75% capacity